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SUPREME COURT, U.S.

In The

Supreme Court of the United States

GREGG SMITH, ET AL.,

Petitioners,

versus

BOARD OF TRUSTEES OF THE LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The plaintiffs are 161 employees of the Louisiana Department of Public Safety and Corrections who filed suit against the Board of Trustees of the Louisiana State Employees' Retirement System under the Contract Clause of both the U.S. and Louisiana Constitutions. They claimed that they had retired and then were reemployed, and should have been entitled under La. R.S. 11:416, as amended by Act 455 (2001), to receive full salary, full retirement benefits after a twelve-month waiting period, continued membership in the state retirement system, and a supplemental retirement after reemployment for at least thirty-six months.

The statutory law setting forth the retirement benefits for qualified Louisiana state employee retirees is found in La. R.S. 11:401, *et seq*. The retirement system is described in that statute and is known as the Louisiana State Employees' Retirement System ("LASERS"). Upon meeting the age and service requirements set forth in the statute, a state employee acquires a "vested right" as defined in La. R.S. 11:403(33). Upon "retirement," as defined in La. R.S. 11:403(24), retirees terminating from active service can choose to be paid in accord with one of the payment options set forth in La. R.S. 11:446. This state retirement system has been in effect for many years.

If a retiree becomes reemployed by the State, the effect of the retiree's reemployment on his retirement benefits is spelled out in La. R.S. 11:416. Prior to June 30, 2001, three options were available: Under Option 1, a reemployed retiree could continue to receive his full retirement benefits until he earned more than fifty percent of his annual allowance. After that point, a reemployed retiree's

benefits were reduced by the amount he earned in excess of fifty percent. A retiree who chose this option could not become a contributing member of LASERS. Option 2 allowed the reemployed retiree to rejoin LASERS by repayment of retirement benefits previously received, with interest. This person was then considered as having never retired. Option 3 allowed the reemployed retiree to request immediate suspension of his benefits and become a member of LASERS as of the first day of reemployment. This allowed the reemployed retiree to earn a supplemental retirement benefit based upon the new employment on the condition the person worked for at least thirty-six months. Under none of these options could a reemployed retiree draw a full salary and full retirement benefits.

Act 455, passed by the Louisiana legislature, amended La. R.S. 11:416 effective June 30, 2001. This Act liberalized the provision by allowing a reemployed retiree to receive both a full salary and full retirement benefits provided he had been retired for a period of at least twelve months, referred to as the "waiting period." The reemployed retiree could also continue to earn credit during his reemployment toward a supplemental retirement benefit if employed for at least an additional thirty-six months. In what appears to be an obvious attempt to treat all reemployed retirees the same, the legislature provided in Act 455 that a reemployed retiree who returned to work earlier than twelve months could still receive his full retirement benefits once the twelve-month waiting period had elapsed.

Plaintiffs, all of whom were eligible for retirement under the state retirement system's age and service requirements, recognized what amounted to a loophole and potential windfall afforded to them by Act 455. If they

retired, and then were rehired, they could receive two income checks (a full salary check and a full retirement benefits check), instead of only one or the other, with the mere passage of the twelve-month waiting period, and they could continue to participate in the state retirement system. Plaintiffs, with the obvious cooperation of certain management employees at the Department of Public Safety and Corrections, signed papers where they allegedly retired on a Friday, and then on that same Friday, signed papers where they were rehired effective the following Monday.

The State legislature responded by passing Act 165 (2002), which enacted La. R.S. 11:416.1, repealing Act 455, reinstating the three options which were available prior to June 30, 2001, and making available a fourth option allowing a reemployed retiree to receive his full salary and full retirement benefits after the twelve-month waiting period but providing that the reemployed retiree "shall accrue no additional service credit during reemployment."[1] Act 165 became effective May 9, 2002.

None of the four options under La. R.S. 11:416.1 permits plaintiffs to receive a full salary, full retirement benefits, and earn a supplemental retirement benefit during reemployment. For instance, under Option 3, plaintiffs can not receive retirement benefits after the

[1] Option 4 allows a reemployed retiree to receive two income checks, a full salary and full retirement benefits after the twelve month waiting period elapses, just as was the case in Act 455. However, under Option 4 a reemployed retiree can not accrue credit towards supplemental retirement benefits (assuming he remains reemployed for at least thirty-six months) if he chooses to draw full retirement benefits.

twelve-month waiting period. The retirement benefits remain suspended during reemployment. Under Option 4, plaintiffs can receive full retirement benefits after the twelve-month waiting period, but can not earn supplemental retirement benefits even when reemployed for at least thirty-six months.

Plaintiffs, in their suit, claim that La. R.S. 11:416.1 required them to select an option which would result in diminishing or impairing benefits which previously existed under Act 455 in violation of the Contract Clauses of the U.S. and Louisiana Constitutions. Defendant answered that none of the plaintiffs had been reemployed for twelve months at the time Act 455 was legislatively repealed and La. R.S. 11:416.1 was enacted, and therefore plaintiffs' rights under Act 455 never "vested" nor "accrued." The District Court agreed with the plaintiffs that La. R.S. 11:416.1 violated the Contract Clauses of the U.S. and Louisiana Constitutions. The Louisiana Supreme Court, however, reversed, finding "that plaintiffs had not met their burden under part one of the Contract Clause analysis that the statute impaired a contractual obligation . . . [T]he rights provided by Act 455, which was in effect when these plaintiffs retired and were rehired, effective June 30, 2001, were reemployment benefits which had neither vested or accrued when the law was changed by La. R.S. 11:416.1." *Smith v. Board of Trustees of Louisiana State Employees' Retirement System*, No. 2002-2161 (La. 06/27/03), 851 So. 2d 1100, 1110.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari to which this Opposition is being filed only raises the U.S. Constitutional Contract Clause issue under U.S. Constitution, Art. I, § 10. Plaintiffs set forth five reasons for granting a writ in this case. *See* Petition for Writ of Certiorari, at 10-18 (hereinafter "Writ"). The first reason offered by plaintiffs, the *Pennie v. Reis* decision, will be addressed in Section I below. The remaining four reasons are interrelated and will be addressed as one in Section II below.

I. The *Pennie v. Reis* Decision Has Been Ignored As A Precedent In Modern Public Retirement Benefit Cases And Was Not Relied Upon By The Louisiana Supreme Court Below

Plaintiffs point to this Court's 1889 decision in *Pennie v. Reis*, 132 U.S. 464 (1889) and suggest that the instant case affords an ideal opportunity to overrule that decision. *See* Writ, at 10-11. This is nothing more than a "straw man" raised by plaintiffs in hopes that it will entice this Court to accept this case.

The First Circuit Court of Appeals has recently stated that *Pennie v. Reis* "stands for the proposition that public employee pension programs do not create vested rights against legislative modifications, and thus are gratuities that a state may freely revoke." *Parker v. Wakelin*, 123 F.3d 1, 6 (1st Cir. 1997). However that court has also noted that "*Pennie* has . . . been ignored as precedent, perhaps because its dicta regarding public pension benefits arose in the context of a Due Process claim." *Id.* And, it further acknowledged that "the modern trend . . . is to protect pension benefits on the theory that a state's promise of

pension benefits represents an offer that can be accepted through the employee's performance – thus, a unilateral, implied-in-fact contract is created that is binding on the state." *Id. See also Transport Workers Union of America, Local 290 v. Southeastern Pennsylvania Transportation Authority*, 148 F.3d 619, 623 (3rd Cir. 1998) (same); and *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12, 16-17 (1st Cir. 1996) (same).

While the First and Third Circuits expressly eschewed the "gratuities" approach of *Pennie v. Reis*, they nevertheless upheld legislative modifications to public retirement benefits against Contract Clause challenges. In *McGrath*, the First Circuit concluded that the state could make modifications, and even terminate a person's retirement benefits, without offending the Contract Clause unless the age and service requirements were met and the person had become vested. The Third Circuit arrived at the same result in *Transport Workers Union, Local 290*. Under the facts in *Parker*, the First Circuit went even further. It found that since there was no attempt to take away retirement benefits that were "currently payable" to existing retirees, regardless of whether "vesting" has occurred, there was no Contract Clause violation.

Pennie v. Reis has nothing to do with the *instant* case and should be rejected out of hand as a reason for granting a writ. The Louisiana Supreme Court did not even mention *Pennie v. Reis*. Instead, it relied upon a "vested rights" analysis similar to that conducted by the First and Third Circuits.

II. The Louisiana Supreme Court's Decision Is Consistent With The Most Recent Federal Circuit Decisions That Have Considered The Same Issue

To the extent plaintiffs "retired,"[2] they had to choose one of the payment options provided for in La. R.S. 11:446. This was obviously not important in their decision to "rehire" since at trial the plaintiffs who testified could not remember which option they picked or why they picked it. If they truly "retired" and are considered as being "retired," it follows that they must have begun accruing a new benefit as a new employee. The disconnect in plaintiffs' argument to the Louisiana Supreme Court was that because they "retired" while Act 455 was in effect, the potential benefits described in Act 455 (which only dealt with a *reemployed* retiree) were in some manner "accrued" or "vested." The Louisiana Supreme Court, in its decision below, declared that "a 'vested' right 'must be absolute, complete and unconditional, independent of a contingency, and a mere expectancy of a future benefit . . . does not constitute a vested right.' (citation omitted) Similarly, 'accrued' has been defined to mean 'in the sense of due and payable; vested,' *Black's Law Dictionary*, and '[the] day on which the creditor could institute his demand.'" 851 So. 2d at 1106.

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[2] Under La. R.S. 11:403(24) "'retirement' means termination of active service, with a retirement allowance granted under the provisions of this Chapter." Under La. R.S. 11:403(32) "'termination' means complete cessation of employment with the state." To consider what plaintiffs did in this case as "retirement" is to elevate form over substance since they never completely ceased employment with the state.

In fact, there is nothing in any law that plaintiffs can point to that establishes a right on behalf of a retiree to be reemployed or rehired once he or she retires. It is the state's perogative to reemploy a retiree, but if the retiree is reemployed, then La. R.S. 11:416 and 416.1 (after May 9, 2002) would control the relationship that the reemployed retiree has with the retirement system. What in fact occurred when these plaintiffs were reemployed is that they began accruing *new* and different potential future benefits as *new* employees. One of those potential future benefits was the opportunity to receive full retirement benefits after a twelve-month waiting period, and another potential benefit was the opportunity to earn a supplemental benefit after an additional thirty-six months of service. Prior to either of these benefits being "accrued" or "vested" by these plaintiffs, the legislature, exercising the authority given it by the Louisiana Constitution in Article X, § 29(E)(5), enacted legislation that altered these future benefits. Neither the twelve nor the thirty-six months had elapsed prior to Act 165 becoming effective on May 9, 2002.

The Louisiana Supreme Court recognized that the Louisiana Constitution, in Article X, § 29(B), states that membership in LASERS creates a contractual relationship, but then held:

> [T]he benefits offered by La. R.S. 11:416 are not retirement benefits, but reemployment benefits. Although these reemployment benefits include the right to certain retirement benefits along with a salary after reemployment for a certain period of time, they do not begin to accrue until a retiree becomes reemployed. Plaintiffs' rights to their retirement benefits under LASERS is [*sic*] not contested, it is their right to be reemployed

> and receive both their salary *and* their retirement benefits after 12 months of reemployment, and then their salary, retirement benefits, *and* supplemental benefits after 36 months of reemployment that is at issue. These plaintiffs simply had not fulfilled the necessary conditions of reemployment in order to be entitled to receive their salary along with their retirement benefits because they had not been reemployed for 12 months prior to the law being changed; similarly they had not been reemployed for 36 months which was a necessary condition to being able to also receive a supplemental benefit.
>
> * * *
>
> [W]e hold that reemployment benefits for retirees can be modified prior to the point when the retirees become eligible for those benefits. Because these rights have neither "vested" nor "accrued," there is no due process violation, or is there a violation of La. Const. Art. X, § 29(E)(5), by virtue of the enactment of La. R.S. 11:416.1. The statute does what the constitution allows, it alters "future benefit provisions of the state and statement public retirement systems."
>
> * * *
>
> As we have found that plaintiffs have not met their burden under part one of the Contract Clause analysis that the statute impairs a contractual obligation, our Contract Clause analysis is at an end.
>
> 851 So. 2d at 1107-08, 10.

"[T]here is no modern United States Supreme Court case that provides guidance as to the rights public employees have to their pensions." *Parker*, 123 F.3d at 8. But the

Louisiana Supreme Court's decision is consistent with the holding in all three Circuit cases cited in the previous section – the Third Circuit's decision in *Transport Workers Union, Local 290* (1998) and the First Circuit's decisions in *Parker* (1997) and *McGrath* (1996). These were all pension cases using The United States Supreme Court's four-part test for analyzing alleged impairment of contracts.

In the first of the cases, *McGrath*, the Rhode Island state retirement statute included a provision reserving the state's power to amend the terms of a member's participation. The Rhode Island legislature revised the method of calculating the minimum years of service before an employee of suitable age could retire. As a result, plaintiff brought a challenge under the Contract Clause. The First Circuit found no constitutional violation, stating:

> [U]nder the contract terms, a member's rights to a retirement annuity are not secure until he or she has met the age and service requirements (and, therefore, has become vested). Until such time, section 45-2147 permits the state to make modifications to, or even terminate, members' rights under the plan without offending the Contracts Clause.

88 F.3d at 20.

In *Parker*, legislative amendments to the Maine state retirement system affected the process by which one computed an employee's "average final compensation." This caused a reduction in the expected pension benefits of many of the members. A number of the plaintiffs had already satisfied the service requirements under the plan. In determining whether there was a Contract Clause violation, the court reviewed in some detail the differing

statutory rules for "vesting" of pension benefits throughout the various states, but noted that "we eschew[ ] participating in abstract contract theory in favor of performing a close analysis of the statutory provision at issue." 123 F.3d at 7. The court then focused on when "benefits are due," and concluded that there was "no unmistakable intent by the Maine legislature to create an enforceable private contract right against the modification of the plaintiffs' retirements benefits *until they are actually receivable*. . . . Thus, no violation of the Contract Clause may be found." *Id.* at 9 (Emphasis added).

In *Transport Workers, Local 290*, amendments to the Southeastern Pennsylvania Transportation Authority Retirement Plan for supervisory, administrative, and management employees required employee contributions, where previously none were required, without any increase in retirement benefits. In responding to plaintiffs' Contract Clause challenge, the Court concluded "that the Plan Amendment did not frustrate any legitimate expectations of the plaintiffs." *Id.* at 622. The court noted that:

> We have found no case . . . holding that an express reservation of a right to modify is ineffective with respect to employees who have *not* satisfied the plan requirements for retirement benefits. It necessarily follows that we have found no case holding that the rights of such employees under the Contract Clause were violated by an exercise of such an express reservation.

148 F.3d at 624 (emphasis supplied by court).

Article X, § 29(E)(5) of the Louisiana Constitution, provides that: "The *accrued* benefits of members of any state and statewide public retirement system shall not be

diminished or impaired. *Future benefit provisions . . . shall* only *be altered by legislative enactment.*" (Emphasis added). According to the Louisiana Supreme Court, this provision "allows [the legislature] to alter[ ] 'future benefit provisions of the state and statewide public retirement systems'" where "rights have neither 'vested' nor 'accrued'. . . . " 851 So.2d at 1108. Thus, the court found, in the language of *Transport Workers, Local 290* quoted above, "an express reservation of a right to modify," but in the instant case, in the State Constitution itself. The United States Supreme Court has stated "we 'accord respectful consideration and great weight to the views of the State's highest court. . . . " *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). This should be doubly true where the State's highest court is interpreting its own State Constitution.

Plaintiffs claim that at least a dozen decisions of state courts of last resort differ with the Louisiana Supreme Court's decision here "on the important federal question presented." Writ, at 13. Five of the cases relied upon by plaintiffs involved plaintiffs who actually had met all of the eligibility requirements and thus had "vested rights" and/or in some cases were already retired and drawing retirement benefits when the legislation adversely modifying their benefits was passed. Those cases are: *Hickey* (Pa. 1954), *Moran* (Wisc. 1983), *Christensen* (Minn. 1983), *Bailey* (N.C. 1998), and *Nicholas* (Nev. 2000). Thus, these cases do not differ, and in fact, are consistent with, the Louisiana Supreme Court's decision in the instant case, and with the three federal Circuit cases discussed above. Another case, *Yeazell*, relied upon by plaintiffs for the proposition "that the right to a pension becomes vested

upon acceptance of employment," Writ at 15, was not decided under either the Arizona or U.S. Constitutions, but was decided under state contract law principles. Yet another case, *Birnbaum* (N.Y. 1958), Writ at 13, was decided solely under a state constitutional provision, New York Constitution, Art. V, § 7, without any discussion of the U.S. Constitution. The New York constitutional provision differed materially from the Louisiana constitutional provision, Article X, § 29(E)(5). The New York provision does not use the word "accrued" to modify the word "benefits" when it states that "the benefits . . . shall not be diminished or impaired," as does the Louisiana constitutional provision.

The remaining cases cited by plaintiffs dealt with individuals or class plaintiffs who had something akin to vested rights as the provisions being modified had been in place for significant periods of time and the plaintiff employees affected, in most cases, were close to meeting their eligibility requirements. These decisions appear to be based on the fact that the employees justifiably relied on the pension benefits at issue. None of these cases cited by plaintiffs involved a "form over substance" situation, like occurred in the instant case, i.e. "retiring" and then being immediately "reemployed" on the same or following work day. There was no justifiable reliance by plaintiffs on Act 455, in this case, but instead plaintiffs were seeking to take advantage of what appeared to be a loophole to "triple dip," by collecting full salary, full retirement benefits, and accrual of a further supplemental retirement benefit.

All of the cases cited by plaintiffs are distinguishable.

Based upon the rationale of the *Transport Workers, Local 290, Parker* and *McGrath* decisions, this Court is

respectfully urged to recognize, as found by the Louisiana Supreme Court, that there is no Contract Clause violation in the instant case, and is urged to reject plaintiffs' Writ application.

CONCLUSION

Considering the decision of the Louisiana Supreme Court on June 27, 2003, the record in this case, and the applicable law, defendant respectfully submits that the Louisiana Supreme Court's dismissal of plaintiffs' claims under the Contract Clause of the U.S. Constitution was correct, and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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